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8 GOYKO KUBUROVICH

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA-SAN JOSE DIVISION
11 No. 5:16-CR-00373-EJD

12 UNITED STATES OF AMERICA,

13 NOTICE OF MOTION AND
14 MOTION TO COMPEL A BILL
15 OF PARTICULARS

16 vs.

17 GOYKO KUBUROVICH, ET AL.

18 Date: 1-29-2018
19 Time: 1:30PM
20 Judge: Honorable, E. J. Davila

21 TO THE UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF
22 CALIFORNIA AND TO THE CLERK OF THE ABOVE ENTITLED COURT:

23 PLEASE TAKE NOTICE that on the above referenced date and time,
24 Defendant GOYKO KUBUROVICH, by and through counsel, will and hereby
25 does move this court to issue an order directing the government to provide
26 defendant with a written Bill of Particulars setting forth the information herein
27 requested. The requested information stems from the August 25, 2016 Indictment
28 filed against defendant.

Defendant, GOYKO KUBUROVICH hereby requests the following
particulars:

As to Count One, *18 U.S.C. § 157* (bankruptcy fraud; aiding and abetting);
Count Two: *18 U.S.C. §§ 152(1)* and 2 (concealment of assets in bankruptcy
proceeding; aiding and abetting), Count Three: *18 U.S.C. § 152(3)* (false statement
in bankruptcy proceeding); defendant requests that the government identify, in non
conclusory language, the facts that show:

1 1) defendant Goyko Kuburovich knew in December 2008, when he passed
2 title to personal property to his daughter and co defendant, that he would be filing
3 for Bankruptcy in May of 2010 (see, Paragraph 8-9, page 2 of Indictment, stating
4 "prior to and in preparation for, the filing of the bankruptcy petition" that
5 codefendant Kristel Kuburovich opened bank accounts and in December of 2008
6 Goyko transferred title of personal property to his daughter Kristel by making
7 deposits into the accounts she opened);

8 2) that defendant Goyko "controlled" NATA LP (see, paragraph 3 of
9 Indictment, alleging in conclusory language that NATA LP was "controlled by"
10 Goyko);

11 3) that bank accounts held in the name of Kristel were instead "controlled
12 by" Goyko Kuburovich (see, paragraph 19 of Indictment, alleging in conclusory
13 language that bank accounts in the name of Kristel were "under his [Goyko
14 Kuburovich's] control";

15 4) that a home owned by NATA LP was instead under "his [Goyko
16 Kuburovich's] ownership and control of his residence" (see, paragraph 19 of
17 Indictment, alleging in conclusory language that a residence owned by NATA LP
18 was instead owned and controlled by Goyko);

19 5) that defendant failed to disclose real property in the name of NATA or
20 personal property in which his daughter Kristel held title because it was "real
21 property over which he maintained control" and "personal property over which he
22 maintained control" (see, paragraphs 21 A, 21B, 23A, 23B, 25A, 25B of
23 Indictment, alleging in conclusory language that a residence owned by NATA LP
24 and bank accounts in the name of Kristel Kuburovich was instead property which
25 Goyko "maintained control" over).

1 This motion is made on the grounds that the Indictment in this action is so
2 vague, overbroad, and non-specific as to these critical and central allegations to
3 criminal culpability which defendant has identified above (that he controlled
4 property he did not hold title to) that it fails to provide defendant with adequate
5 notice of the nature of the charges against which he must defend, so as to prevent
6 surprise at trial or to allow defendant to prepare his defense, or to permit defendant
7 to raise duplicity as a bar in any subsequent prosecution.

8
9 This motion is based on the Memorandum of Points and Authorities, the
10 records in this action, and such additional oral and documentary evidence
11 presented at the hearing.

12 Dated: 12-11-17

13 

14 J. David Nick
15 Attorney for Defendant, Goyko Kuburovich

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **I. INTRODUCTION**

18
19 Defendant is charged by indictment with the following criminal charges:
20 Count One: *18 U.S.C. § 157* (bankruptcy fraud; aiding and abetting); Count Two:
21 *18 U.S.C. §§ 15, subdivisions (1) and (2)* (concealment of assets in bankruptcy
22 proceeding; aiding and abetting), Count Three: *18 U.S.C. § 152(3)* (false statement
23 in bankruptcy proceeding).

24 The Indictment in essence recites detailed facts that show that in a period
25 just under 2 years prior to the filing of the bankruptcy petition, Goyko Kuburovich
26 passed title to money to his daughter Kristel and her company (NATA LP) and that
27 a portion of that money was used to purchase a home in which title was held in the
28 name of NATA LP. However, of Due Process concern here is that the indictment

1 goes on to recite, in conclusory language, key allegations essential to establish
2 criminal liability; i.e., that Goyko knew when he transferred title of property to his
3 daughter that he would be filing bankruptcy 2 years later and that all the property
4 transferred to and held in his daughter's name (or NATA, a corporation controlled
5 by his daughter) was in actuality owned and controlled by Goyko. The indictment
6 merely says it is so and does not state a single fact to support these allegations; the
7 allegation that Goyko had "control" over, an "interest in" or "ownership" of
8 property not held in Goyko's name (but instead was property in the name of NATA
9 a corporation controlled by Kristel or Kristel) are critical because a petitioner has
10 no duty to reveal property he does not have an interest in or title to; this is a term
11 defined under case law. See, *In re Hammerstein* (1911, 2nd Cir.) 189 F. 37
12 [property transferred prior to filing of petition in order to avoid creditors reach
13 need not be disclosed as defendant has no title and thus no responsibility to
14 disclose.]; *United States v. Hale* (10th Cir., 2014) 762 F.3d 1214 (same); *Parks v.*
15 *Ditmar* (10th Cir. 2010) 618 F.3d 1199 (same, with 3 part analysis to determine of
16 petitioner has an "interest" in property no held in his name.); *In re Reis* (1982) 22
17 B.R. 343 (same); *In re Smith* 11 B.R. 20 (same); *Farey v. Sanderfoot* (1991) 500
18 U.S. 291, 299 [whether a debtor "possessed an interest in property" is "a question
19 of state law" in the first instance.]; *In re Barigian*, (2012, Bankruptcy Court,
20 Eastern Dist CA) 2012 Bankr. LEXIS 6118 ["The Plaintiff's claims depend upon
21 the Debtor having an interest in the Hayvenhurst Property at the time she filed her
22 bankruptcy petition or during the avoidance period prior to filing. While the
23 Plaintiff's ability to recover such an interest in the context of the Debtor's
24 bankruptcy case rests in bankruptcy law, the determination of that community
25 interest is defined by California state law."]; *In re Nistler*, (2001) 259 B.R. 723
26 [debtor has no interest in and no duty to disclose an inheritance which the debtor
27
28

1 rejected and instead passed to other heirs.]; *United States v Ledee* (2013, DC
2 *Puerto Rico*) 967 F Supp 2d 516 [debtor that transferred property to corporation he
3 had 100 percent control over had an interest in the property and debtor is
4 criminally liable for not disclosing it in the petition.]

5 What this indictment recites is Goyko's transfer of the assets to his daughter
6 over one year prior to the petition and that defendant failed to reveal that property,.
7 However, the allegation of control over these assets (which the indictment alleges
8 are not held in Goyko's name) is instead recited in the most conclusory and general
9 terms possible-but for the conclusory allegations of control over the property
10 Goyko did not hold title to (money and the house), the indictment would otherwise
11 be reciting lawful transfer of property to Kristel more than one year prior to the
12 filing of the bankruptcy petition.
13

14 The discovery includes a trail of documents showing Goyko transferred
15 money to Kristel over one year prior to the filing of the petition (commencing in
16 December 2008) but has no information at all of any kind that even inferentially
17 gives defendant any indication as to exactly how it is that Goyko actually owned,
18 controlled or had an interest in the real property in the name of NATA or the bank
19 accounts held in the name of Kristel. And the indictment merely states that is the
20 case and does not state any facts to support that conclusion. The government
21 merely alleges vague allegations on these critical allegations. The need for the
22 government to establish more than what is plead in this indictment on the issues
23 identified has long been established:
24

25 "The principal accusation of fraud is based upon the conveyance by the
26 bankrupt of the Nantucket property to her father and by him to her son over
27 two years prior to the adjudication in bankruptcy. At the time the petition
28 was filed and the schedules verified, the legal title to this property was not
in the bankrupt and had not been for two years and seven months. The
transfer to her son, conceding it to be fraudulent as to then existing

creditors, has not been made by the act a sufficient ground for refusing a discharge. About this there is no disagreement. In order to establish a fraudulent concealment it must appear that the property concealed belongs to the bankrupt's estate. It must be shown that the transfer was merely a temporary expedient to place the property beyond the reach of the trustee, the title to be resumed by the bankrupt as soon as prudence will permit. in other words, it must be proved that a secret trust exists in her favor and that her son is under agreement, expressed or implied, to reconvey the property to her when the danger of attack by the creditors has passed."

In re Hammerstein (1911, 2nd Cir.) 189 F. 37, 39.

Essentially all defendant knows about the charges he now faces is that the government is *merely* alleging without any factual basis that he had "control" over and "interest" in or ownership of property which defendant did not hold title to. These schemes are commonly plead with specifics as for example: "the property was transferred with a secret agreement between the debtors daughter and the debtor entered into on such and such date and such location to retransfer the property back to the debtor after the debts were discharged". Accordingly, defendant respectfully requests that the Court direct the filing of a bill of particulars, as requested in the foregoing notice, so that this matter may fairly proceed in accordance with due process.

II. ARGUMENT

A. THE PRESENT INDICTMENT IS VAGUE AND FAILS TO PROVIDE DEFENDANT WITH ADEQUATE NOTICE OF THE NATURE OF THE CHARGES AGAINST WHICH HE MUST DEFEND, SO AS TO PREVENT SURPRISE AT TRIAL AND TO ALLOW HIM TO PREPARE HIS DEFENSE.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged[.]" In determining the sufficiency of an indictment, the United States Supreme Court has emphasized two

of the protections which an indictment is intended to guarantee. These two protections are “reflected by two of the criteria by which the sufficiency of an indictment is to be measured.” Russell v. United States (1962) 369 U.S. 749, 763.

These criteria are:

1) [W]hether the indictment contains the elements of the offense intended to be charged and sufficiently appraises the defendant of what he must be prepared to meet.

2) [I]n case any other proceedings are taken against him for a similar offense whether the record shows with accuracy to what extent he may plead a former acquittal or conviction
Russell, supra at 763-764.

To satisfy these requirements, an indictment must “set forth the elements of the offense charged and contain a statement of the *facts and circumstances*” such that the defendant will be apprised of the specific offense that he has been charged with. United States v. Cecil (9th Cir. 1979) 608 F.2d 1294, 1296; Hamling v. United States (1974) 418 U.S. 87, 117-118. Further, as the Court in Russell noted, it is “an elementary principal of criminal pleading” that where the definition of the criminal charge includes generic terms it is insufficient for the indictment to charge the offense in the same generic terms as in the definition; it must “state the species,- it must descend to particulars.” Id. quoting United States v. Cruikshank (1875) 92 U.S. 542, 558.

Where charges of an indictment are so general that they do not sufficiently advise defendant of the specific acts with which he is charged, a bill of particulars should be ordered. United States v. Smith (W.D.MO 1954) 16 F.R.D. 372, 375; United States v. Grossman (D.C.N.Y. 1931) 55 F.2d 408. Rule 7(f) of the Federal Rules of Criminal Procedure provides a defendant may move for a bill of particulars which the court then directs the government to file. F.R.Cr.P. 7(f). The

1 granting or refusal of a bill of particulars “is a matter within the sound discretion of
2 the trial court.” Yeargain v. United States (9th Cir. 1963) 314 F.2d 881, 882.

3 In United States v. Laykin (9th Cir. 1989) 886 F.2d 1534, the defendant
4 argued the indictment in which he was charged was fatally defective because it was
5 imprecise as to the time of the conspiracy. Id. at 1542. The indictment read, in
6 part: “[b]eginning on a date unknown to the Grand Jury, but not later than on or
7 about March 1, 1985, and continuously thereafter and including on or about
8 October 14, 1986[.]” Id. The court noted the dates as specified in the indictment
9 did not give an adequate basis for ascertaining the charges against the defendant.
10 Id. However, the court held the indictment valid because “the overt acts alleged in
11 the indictment before us provide a narrowing focus.” Id. Indeed, the indictment
12 listed *18 overt acts* which acted as a basis for limiting the time frame in the
13 indictment and gave defendants notice of the scope of the charges against them.
14 Id.

15
16 The conclusory and non factually based allegation that defendant controlled
17 property he did not hold title to as plead in the indictment provides no indication
18 whatsoever as to how it is that Goyko controlled these assets or how he had an
19 interest in them; this is a critical allegation for due process to be served. "The
20 foundation of the charge is concealment of the bankrupt's property. If the bankrupt
21 has conveyed it, no matter how fraudulently, so that he has lost all right, title and
22 interest therein, it is not a concealment under the provision of the act referred to. If
23 the bankrupt has parted with all dominion over the property, if the title is gone out
24 of him and is beyond recall, it is not his property, and therefore is not "property
25 belonging to his estate in bankruptcy."" *In re Hammerstein* (1911, 2nd Cir.) 189 F.
26 37, 39.
27
28

1 In United States v. Cecil (9th Cir. 1979) 608 F.2d 1294, the two count
2 indictment was held to be insufficient. Indeed the Ninth Circuit called the
3 indictment “a rather barren document.” Id. at 1296. The court noted the
4 indictment, like the one here, merely tracked the language of the applicable statutes
5 in setting out the elements of the offenses and only made two particular allegations
6 regarding the conspiracies. Id. at 1296-1297. Specifically, that the conspiracies
7 occurred in Arizona, Mexico, and elsewhere and offered the names of some
8 alleged co-conspirators. “More importantly,” the court noted, “the indictment fails
9 to place the conspiracies within any time frame.” Id. at 1297.
10

11 Furthermore, in Cecil the “indictment clearly lacked a statement of the facts
12 and circumstances that would inform the accused of the specific offenses with
13 which they were charged.” Id. at 1297.

14 The instant indictment does exactly what the court in Cecil found to be
15 insufficient; it tracks the language of the statute and states in conclusory language
16 that Goyko either had an interest in, control over or ownership over property he did
17 not hold title to and makes no specific allegations as to exactly how Goyko had an
18 interest in, control over or ownership of property not held in his name but in his
19 daughter or NATA a company controlled by her. Moreover, this indictment makes
20 other critical conclusory statements without a single fact to support the allegation,
21 that NATA LP (a company controlled by Kristel, and established by private
22 counsel for Kristel) was instead controlled by Goyko as well. Additionally the
23 indictment here recites in conclusory language that over one year prior to the filing
24 of the petition that Goyko knew he was going to file bankruptcy and that is why he
25 transferred all the property to Kristel but does not state a single fact to support this
26 conclusion (that Goyko knew over one year prior to filing bankruptcy that he was
27 going to do so and specifically transferred the property for the purpose of
28

1 accomplishing bankruptcy fraud), the government merely alleges that is the case
2 and nothing in thier discovery even inferentially supports that conclusion.

3 In addition to merely following the language of the statutes, the instant
4 indictment lacks a statement of the facts and circumstances that would inform the
5 defendant of the specific offenses with which he has been charged, as has long
6 been held to be necessary in criminal pleading; the defects are the same conclusory
7 allegations of controlling property that Goyko did not own, that he planned
8 bankruptcy over a year prior to filing and that he controlled NATA-the government
9 must identify some fact upon which it bases this sweeping conclusion. Russell,
10 *supra*; Cruikshank, *supra*; Cecil *supra*; Hamling v. United States (1974) 418 U.S.
11 87, 117-118; Morissette v. United States (1952) 342 U.S. 246, 270; United States
12 v. Petrillo (1947) 332 U.S. 1, 10-11.

13
14 The present danger of such a vague indictment is clear: a defendant who
15 does not sufficiently know or understand the charges against him cannot
16 adequately prepare a defense or avoid unfair surprise at trial-how exactly the
17 government is going to go about establishing the conclusory allegations in the
18 indictment of controlling property that Goyko did not own, that Goyko planned
19 bankruptcy over a year prior to filing and that he controlled NATA .

20 **B. THE DEFENDANT IS ENTITLED TO A BILL OF**
21 **PARTICULARS TO REMEDY THE INSUFFICIENT**
22 **INDICTMENT AT ISSUE IN THE PRESENT CASE.**

23 Where an indictment is deemed too vague, a bill of particulars serves the
24 purposes of: 1) informing the defendant of the nature of the charges against him
25 with sufficient particularity so that he may prepare for trial, 2) avoiding the danger
26 of surprise at trial, and 3) eliminating the risk of being prosecuted again for the
27 same offense. Geise, *supra* at 1180; United States v. Birmley (9th Cir. 1976) 529
28 F.2d 103, 108. A bill of particulars provides due process notice where the

1 indictment is incomplete or nonspecific. Cruikshank, *supra* at 558-559. Such a
2 bill is “intended to supplement the indictment by providing more detail of the facts
3 upon which the charges are based.” United States v. Inryco, Inc. (9th Cir. 1981)
4 642 F.2d 290, 295.

5 “It seems quite clear that where charges in an indictment are so general that
6 they do not sufficiently advise the defendant of the specified acts with which he is
7 charged, a bill of particulars should be ordered.” Smith, *supra*. A bill of
8 particulars is an appropriate vehicle for a defendant to learn, as the law entitles
9 him, “the theory of the government’s case.” United States v. Geise (9th Cir. 1979)
10 597 F.2d 1170, 1181, quoting Yeargain, *supra* at 882.

11
12 Determining whether a bill of particulars should be ordered calls for
13 “discrete decisions properly infused with the ambience of the trial scene and
14 tailored to fit the facts before the trial judge.” United States v. Davis (5th Cir.
15 1978) 582 F.2d 947, 951. In resolving areas of doubt when the competing interests
16 of the government and the defendant are closely balanced, the interests of the
17 defendant in disclosure and proper notice must prevail. United States v. Thevis
18 (N.D. Ga. 1979) 474 F.Supp. 117, 124 (stating that the law governing the request
19 for a bill of particulars “requires that the defendant be given the benefit of the
20 doubt in gray areas.”). Due to the fundamental connection a bill of particulars has
21 to the Sixth Amendment right to counsel, any doubt should be resolved in favor of
22 disclosure and the right of the accused to mount a defense. United States v. Tanner
23 (N.D. Ill. 1969) 279 F. Supp. 457, 474; United States v. Manetti (D.C. Del. 1971)
24 323 F. Supp. 683, 696.

25
26 In Geise the trial court did not grant a bill of particulars where the
27 indictment listed over 13 overt acts and the government had provided full
28 discovery. Geise, *supra* at 1180. The court found that because of the alleged overt

1 acts, the extensive discovery, and evidence previously disclosed, that the
2 information already available to the defense was more than the defendant had a
3 right to. Id.

4 However, the government does not fulfill its obligation to inform the
5 defendant of the theory of the prosecution and the nature of the charges by “merely
6 providing mountains of documents to defense counsel[.]” United States v.
7 Bortnovsky (2^d Cir. 1987) 820 F.2d 572, 575. The production of a large number of
8 documents in discovery may weigh in favor of granting a bill of particulars.

9 In United States v. Taylor (S.D.N.Y 1989) 707 F.Supp 696, the defense
10 was provided with the indictment, a criminal complaint, and the affidavit in
11 support of a search warrant. Yet the court ordered the government to provide the
12 following particulars:
13

- 14 1. The names of all persons whom the government will claim at trial were
15 co-conspirators...if incarcerated, that fact should be made known.
- 16 2. The dates, to the extent known, that each of the defendants allegedly
17 joined the conspiracy.
- 18 3. The approximate dates and locations of any meetings or conversations at
19 which the government will contend that [defendant] joined the
20 conspiracy. Exact dates shall be given if known...

21 See, United States v. Taylor (S.D.N.Y. 1989) 707 F.Supp 696, 699-700; *cf.*
22 United States v. Orozco (S.D. CA 1985) 108 F.R.D. 313, 318 (denying requested
23 particulars as to conspiracy counts where said counts named the alleged co-
24 conspirators, listed numerous overt acts, and “outlined how each defendant
25 allegedly contributed to the conspiracy”)

26 In Taylor the defendant had substantially more meaningful information than
27 in the instant indictment yet the bill of particulars was granted in part.
28

1 While the prosecution has provided voluminous discovery, none of it
2 answers the questions posed by the lack of any facts plead to provide notice as to
3 how exactly that Goyko has an interest over property he transferred title to Kristel
4 over one year prior to the filing. Therefore the discovery disclosed hardly
5 supplements the vague indictment in giving defendant the required notice of the
6 charges against him.

7
8 As exemplified in United States v. Cecil, a conspiracy charge that merely
9 lists the object offense and alleges the existence of a criminal agreement is
10 insufficient. Cecil, *supra* at 1296-1297. Furthermore, a motion for a bill or
11 particulars cannot be denied on the theory that a defendant “knows” what he or she
12 “did” as such reasoning would effectively stand the presumption of innocence on
13 its head. *See United States v. Tanner* (N.D. Ill. 1969) 279 F. Supp. 457, 474, n.13;
14 *United States v. Manetti* (D.C. Del. 1971) 323 F. Supp. 683, 695-96.

15 **C. DEFENDANT IS ENTITLED TO A BILL OF PARTICULARS**
16 **TO OBTAIN THE FACTS THE GOVERNMENT RELIES ON**
17 **FOR ITS ALLEGATION THAT DEFENDANT CONTROLLED**
18 **PROPERTY NOT IN HIS NAME AND FOR WHICH TITLE**
19 **WAS HELD BY SOMEONE ELSE.**

20 “A bill of particulars is a proper procedure for discovering the names of
21 unindicted coconspirators who the government plans to use as witnesses.” United
22 States v. Barrentine (5th Cir. 1979) 591 F.2d 1069, 1077; *See also: Will v. United*
23 States (1967) 389 U.S. 90, 99. Furthermore, “where a defendant seeks legitimate
24 information, he may not be denied it merely because the *effect* of providing it is to
25 divulge the names of government witnesses[.]” United States v. Addonizio (3rd
26 Cir. 1971) 451 F.2d 49, 65.

27 In United States v. Rogers the court held that the government is required to
28 disclose by way of bill of particulars unindicted co-conspirators, stating “to do
otherwise is to guarantee prejudicial surprise to the defendant if the government is

1 allowed to produce undisclosed, unknown members of the enterprise and its
2 activities to testify against the defendant.” United States v. Rogers (D.C. Colo.
3 1985) 617 F.Supp. 1024, 1028, quoting United States v. Thevis (N.D. Ga. 1979)
4 474 F.Supp. 117, 125.

5 Because nothing has been disclosed which would apprise Goyko of the
6 conduct the government relies on to conclude he had control over property he
7 transferred to Kristel, that he planned to file bankruptcy over a year prior to the
8 filing of the petition and that he controlled NATA, defendant is unable to
9 adequately prepare for trial. Essentially everything at trial will be a surprise;
10 defendant is left to guess as to what actions the government claims was criminal or
11 show he was in control over property not held in his name. As the indictment is
12 woefully barren and, even with the discovery, fails to provide defendant with
13 notice of the conduct for which he has been charged.

14 CONCLUSION

15 The present indictment fails to give adequate notice of the specific acts for
16 which defendant is being charged. In order to avoid the prejudice that would result
17 from his being forced to defend himself against and ambiguous indictment,
18 defendant respectfully requests that the court order the government to provide a
19 bill of particulars as to that count.

20 Dated: December 11, 2017

21 Respectfully Submitted,

22 

23 J. David Nick
24 Attorney for Defendant
25 Goyko Kuburovich
26
27
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